Supreme Court, U. S.
FILED
JUL 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON, *et al.*,
Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
Appellees.

BRIEF OF AMICI CURIAE

National Congress of American Indians, Inc.,
Seminole Tribe of Florida,
Las Vegas Indian Colony,
Reno-Sparks Indian Colony, and
Sisseton-Wahpeton Tribe of South Dakota

Of Counsel:

STEPHEN H. WHILDEN
Hollywood, Florida

PETER J. SFERRAZZA
Reno, Nevada

BERTRAM E. HIRSCH
Belle Rose, New York

WILKINSON, CRAGUN & BARKER
GLENN P. SUGAMELI
Washington, D.C.

CHARLES A. HOBBS
1735 New York Avenue, N.W.
Washington, D.C. 20006

Counsel for Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

		Page
STATEMENT OF INTEREST		1
QUESTION PRESENTED		2
I.	AN OVERVIEW OF UNITED STATES POLICY AND INDIAN SELF-GOVERNMENT	3
II.	MEANINGFUL TRIBAL GOVERNMENT DEPENDS UPON ABILITY TO TAX	7
III.	THE SEMINOLE TRIBE OF FLORIDA	11
IV.	THE COEUR D'ALENE TRIBE	13
V.	THE NEVADA TRIBES	14
VI.	THE SISSETON-WAHPETON SIOUX TRIBE	18
VII.	THE CROW TRIBE	19
CONCLUSION		21
APPENDIX A.	Message of President Nixon to Congress, July 8, 1970	1a
APPENDIX B.	Remarks of President Ford to Indian Leaders, July 16, 1976	13a
APPENDIX C.	Message of President Carter to National Congres of American Indians, Inc., August 30, 1978	18a
APPENDIX D.	*Vending Unlimited, Inc.* v. *State of Florida*, Opinion of Dist. Ct. of App., Nov. 22, 1978	19a
APPENDIX E.	*Vending Unlimited, Inc.* v. *State of Florida*, Opinion of Leon County Circuit Court, March 3, 1978	21a

TABLE OF CITATIONS

Cases: Page

Bates v. *Little Rock*, 361 U.S. 516 (1960) 9
Bryan v. *Itasca County*, 426 U.S. 373 (1976) 10, 13
Confederated Salish & Kootenai Tribes v. *Moe*, 392 F. Supp. 1297 (D. Mont. 1974), supp. opinion 392 F. Supp. 1325 (1975), affirmed, 425 U.S. 463 (1976) 13, 14
Confederated Tribes of Colville v. *State of Washington*, 446 F. Supp. 1339 (1978) 13
Crow Tribe v. *State of Montana*, —— F. Supp. —— (D. Mont. April 3, 1979) 20
DeCoteau v. *District County Court*, 420 U.S. 425 (1975) 18
James v. *Dravo Contracting Co.*, 302 U.S. 134 (1937) 9
Mahoney v. *State Tax Comm'n*, 96 Ida. 59, 524 P.2d 187 (1973), reaffirmed, 524 P.2d 197 (1974), cert. denied, 419 U.S. 1089 14
McClanahan v. *State Tax Comm'n*, 411 U.S. 164 (1973) 13
Merrion v. *Jicarilla Tribe*, unreported (D.N.M. 1977), on appeal to 10th Cir. 11
Moe v. *Confederated Tribes*, (see Confederated Tribes) 13, 14
Morris v. *Hitchcock*, 21 App. D.C. 565, affirmed, 194 U.S. 384 (1904) 10
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 11
Santa Rosa Band of Indians v. *Kings County*, 532 F.2d 655 (9th Cir. 1975) 10
Vending Unlimited, Inc. v. *State of Florida*, 2d Jud. Cir. Ct. for Leon County (1978) 13
Vending Unlimited, Inc. v. *State*, 364 So.2d 548 (Dist. Ct. App. Fla. 1978) 13

Treaties and Statutes:

General Allotment Act, 24 Stat. 388, 25 U.S.C. § 331 4
Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461ff 4, 15

TABLE OF CITATIONS—Continued

Page

Indian Financing Act of 1975, 25 U.S.C. §§ 1451ff.. 5
Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §§ 450ff 6
Act of October 20, 1972, 86 Stat. 919 as amended, 31 U.S.C. §§ 1227, 1228 (Supp. V 1975) 11
25 U.S.C. § 174 (AIPRC) 7
25 U.S.C. § 891 (Menominee) 5
25 U.S.C. § 903 (Menominee) 5
30 U.S.C. § 226 8
43 U.S.C. § 1457 3
Fla. Stat. Ann. 210.18(4) 13
Mont. Rev. Codes Ann. §§ 84-1312 to -1325 (Cum. Supp. 1977) (now codified at M.C.A. §§ 15-35-101 to -110, 15-25-701 to -704) 19, 20
Nev. Rev. Stat. Ch. 370 16

Miscellaneous:

American Indian Policy Review Commission Report (1977) 3, 6, 7, 8
Message of President Nixon to Congress, July 8, 1970 5
Remarks of President Ford to Indian Leaders, July 16, 1976 6
Message of President Carter to National Congress of American Indians, August 30, 1978 6
Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Land*, 124 U.Pa. L. Rev. 491 (1975) 8
Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 Law & Contemp. Prob. 166 (1976) 8
Barsh, *The Omen: [Confederated] Tribes* v. *Moe and the Future of a Tribal Self-Government*, 5 Amer. Inc. L. Rev. 1 (1977) 9, 16
55 I.D. 14, 47 (1934) 10
57 I.D. 129 (1940) 14
43 Fed. Reg. 16284 (1978) 3
44 Fed. Reg. 7235 (1979) 3
H. Con. Res. 108, 67 Stat. B132 (1953) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON, *et al.*,
Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; AND MAKAH INDIAN TRIBE,
Appellees.

BRIEF OF AMICI CURIAE

National Congress of American Indians, Inc.,
Seminole Tribe of Florida,
Las Vegas Indian Colony,
Reno-Sparks Indian Colony, and
Sisseton-Wahpeton Tribe of South Dakota

STATEMENT OF INTEREST

The National Congress of American Indians, Inc. is a nonprofit association of 146 Indian tribes, including most of the major tribes in this country. It was incorporated in Oklahoma in 1954 to represent the interests of the Indian tribes of this country, and maintains its national headquarters at 1430 K Street, N.W., Washington, D.C. Its leadership is elected by its members. Its President is Veronica Murdock of the Colorado River Reservation,

Arizona; and its Vice President is Mel Tonasket of the Colville Reservation, Washington. NCAI's concern here arises from the fact that this case involves the extent to which Indian tribes may tax commerce between Indians and non-Indians on their reservations. This is to Indian tribes one of the most important issues before the courts today.

The other amici are the Seminole Tribe of Florida, the Reno-Sparks Colony of Nevada, the Las Vegas Colony of Nevada, and the Sisseton-Wahpeton Tribe of South Dakota, who are more fully described below. All are organized American Indian tribes recognized by the United States as being under federal supervision, and all derive tax revenues from retail cigarette sales on their reservations.

Your amici support the decision of the District Court.

QUESTION PRESENTED

The issue here is one of fundamental importance to the future of Indian tribes: whether they have the power, should they choose to assert it, (1) to tax commercial transactions occurring on the reservations between Indians and non-Indians, and (2) by so doing to preempt state taxation of the same transaction, at least where the state taxes interfere with collection of the tribe's taxes. We believe that in light of Congressional and Executive policy and the precedents of this Court, the answer is yes.

We believe the legal issues are fully analyzed by the Appellee tribes in their elegant brief, and that we could not add usefully thereto. We believe that we can be of help to the Court by presenting some statistics on the national Indian situation today, and focusing especially on several particular tribes to whom taxing power is of immediate importance, so that the Court may better appreciate some of the ramifications of the issues at stake here.

I. AN OVERVIEW OF UNITED STATES POLICY AND INDIAN SELF-GOVERNMENT TODAY

There are about 278 organized Indian tribes in the United States today,[1] and about 1,000,000 Indians.[2] The Indians originally, of course, owned all the land in the United States. Today they own some 51,533,000 acres under federal supervision,[3] or an area the size of New York, Connecticut, Massachusetts, New Hampshire and Vermont. This land is owned partly by Indian tribes and partly by their members. The large majority of this land is held in trust for the Indian owners by the United States; the balance is not technically held in trust, but is restricted and is under federal supervision the same as the trust land.

The Secretary of the Interior is the designated officer in charge of handling the federal supervision, 43 U.S.C. § 1457, and the Secretary's agency for performing this responsibility is the Bureau of Indian Affairs.[4]

The preeminent goal of Indian tribes today is to improve self-government of their reservations, and a corol-

---

[1] 44 Fed. Reg. 7235 (1979), not counting Alaska native villages.

[2] The Official Indian Health Service Population Projections for Fiscal Year 1979 calculated the total United States Indian population to be 1,096,637, with 734,185 living on or near reservations.

[3] BIA, Office of Trust Responsibilities, Annual Report of Indian Lands (1977). In 1875, the total Indian reservation land base was about 166,000,000 acres. AIPRC Final Report, Vol. I, p. 308 (see note 6 below).

[4] The BIA Reorganization Task Force, established by the Secretary of the Interior, recently set forth the mission of the BIA, including "(2) To recognize and preserve the inherent rights of Indian tribal and Alaska Native self-government; to strengthen the capacities of these governments to govern . . . ." 43 Fed. Reg. 16284 (1978).

lary of this is to develop the economic resources of their reservations to provide the revenue on which meaningful self-government depends.

Some tribes own assets capable of development and of direct income to tribes through leases and sales. However, due to the national policy prior to 1934, which called for allotting tribal land to individaul Indians,[5] many tribes have been left with little land, and have no realistic prospect of raising revenue except through taxation of commerce on the reservation.

The modern statutes relevant to Indian self-government began with the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461*ff*. This Act repudiated the disastrous allotment policy, which was in fact a tribal termination policy, and set up the framework for tribes to organize and become self-governing communities recognized and supported by the United States. The preamble of the Act declares that Congress' purpose was—

> "To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes." 48 Stat. 984.

Many tribes organized under the Act, and elected tribal governments. Political and economic development, though encouraged by the Act, was slow. In the 1950's tribal progress under federal supervision was threatened by the termination policy that gained favor during the Eisenhower administration.[5a] Fortunately for tribal prog-

[5] This policy is embodied in the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331.

[5a] The policy was declared by Congress in H. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

ress, the termination policy became a dead letter after 1962, though not before several tribes were terminated.[5b]

In 1970 President Nixon delivered an historic message to Congress, excerpts reprinted at App. 1a-12a. After repudiating the termination policy of the 1950's, and declaring that the federal trusteeship of Indians is not "an act of generosity" but is "the result of solemn obligations," and "continues to carry immense moral and legal force," the President concluded:

> "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy." App. 4a-5a.

One of President Nixon's recommendations became the Indian Financing Act of 1974, 25 U.S.C. §§ 1451*ff*, which authorized federal loans to Indian tribes. Section 2 declared the policy of Congress as follows:

> "It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own produc-

[5b] Six Indian groups were terminated in 1954 (e.g., Menominee, 25 U.S.C. § 891), two more in 1956, two more in 1958, and one in 1962. There have been no terminations since then, and in fact several have been restored to federal supervision, e.g. Menominee, 25 U.S.C. § 903.

tive efforts comparable to that enjoyed by non-Indians in neighboring communities."

The following year Congress enacted another of President Nixon's recommendations, the Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. §§ 405*ff*. The essence of this Act was to allow tribes to contract with the BIA to perform some of the federal services to the tribes. Section 3(b) provided as follows:

> "The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services."

In 1976 President Ford reiterated his support of the foregoing policies, and declared his commitment to tribal "self-determination." App. 15a.

In 1978 President Carter declared that he considered it his duty to see that the U.S. fulfilled its responsibilities to Indians, "within the framework of self-determination for American Indians." App. 18a.

But improvement of tribal self-government, the avowed goal of Congress and the Executive Branch, has been severely impeded by the adverse socio-economic conditions on the reservations. Government studies have repeatedly demonstrated that American Indians continue to be the poorest, worst fed, least healthy group and to have the highest unemployment rate of any group in the United States population. This was documented most recently in 1977, when the American Indian Policy Review Commission issued a meticulous and scathing report.[6] It concluded that Indian reservation development was undermined by conditions on the reservation.[7]

If tribes are to realize the degree of self-government and self-support that the Legislative and Executive Branches intend, something must be done to improve the substandard conditions on the reservations. Federal grants and other assistance continue to be vital, but tribes will never be able to develop healthy economies until they develop their own sources of revenue.

II. MEANINGFUL TRIBAL GOVERNMENT DEPENDS UPON ABILITY TO TAX

The American Indian Policy Review Commission Report, while documenting poor conditions on reservations, indicated the great potential of many Indian tribes

---

[6] The American Indian Policy Review Commission (AIPRC) Final Report is a monumental review of Indian facts and policies. The Commission was created by Congress in 1975, P.L. 93-580, 88 Stat. 1910, and instructed to "conduct a comprehensive review of the historical and legal developments underlying the Indian's unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." 25 U.S.C. 174 (1979 Supp. note). The membership of the Committee included Senators Metcalf, Abourezk and Hatfield; Congressmen Meeds, Yates and Steiger; and five representatives of the Indian community. These were sworn in by Mr. Justice White on May 2, 1975.

The Commission appointed 11 task forces to study and report on a wide range of subjects. The final report of the Commission was submitted on May 17, 1977, and consisted of 7400 pages, including two volumes of the final Committee report and 11 separate task force reports, AIPRC Report, 95th Cong., 1st Sess.

[7] Indian poverty statistics are summarized in the AIPRC Final Report, e.g., Vol. 1, pp. 91-94. The Commission noted the substandard "physical infrastructure" of Indian reservations, i.e. transport, power, water and communications systems. Lack of these systems discourages outside investments, yet tribes lack capital to improve their infrastructure systems. Final Report, Vol. 1, pp. 354-357 (1977).

to develop into independent economic units. Many Indian reservations contain large amounts of natural resources.[8] Taxation of these resources can provide substantial amounts of money for tribal governments.[9] Although the proceeds of sale of these resources (when owned by the tribes as opposed to their members) do presently provide vital income to the tribes, the amounts are often less than it would seem they should be. For example, in 1978, royalties actually received from Indian leases of coal averaged only 10%, less than one-half the 22% received from federal coal leases.[10] In fact, the 10% received by the Indians was even less than the statutory minimum of 12.5% required for federal minerals.[11]

For tribes that own no natural resources, taxation may represent the only revenue-raising method available. Congress has not yet seen fit to give tribes power to issue

---

[8] "Deposits of oil and gas, coal, uranium and phosphate are found on some 40 reservations in 17 states. Production of coal on Indian lands in 1974 was 35.8 percent of the combined production on Federal and Indian lands (1.9 percent of the Nation's total); excluding offshore oil production, Indian lands produced 13.6 percent of the total production value of oil and gas on all Federal and Indian lands (4.4 percent of the Nation's total); phosphate production on Indian land was 35.4 percent of production on Federal and Indian land (4.9 percent of the Nation's total); and Indian lands produced fully 100 percent of the uranium value produced on all Federal and Indian lands." AIPRC Final Report, Vol. I, p. 7.

[9] See Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 Law & Contemp. Probs. 166 (1976); Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Land*, 124 U.Pa. L. Rev. 491 (1975).

[10] U.S. Geological Survey, U.S. Department of Interior, *Federal and Indian Lands Coal, Phosphate, Potash, Sodium, and Other Mineral Production, Royalty Income, and Related Statistics* 39 (1979). *See generally* Federal Trade Commission, *Staff Report on Mineral Leasing on Indian Lands* (1975).

[11] 30 U.S.C. § 226.

tax-exempt bonds.[12] Such bonds often represent a major source of income for many state and local governments. As a consequence of the extreme poverty of the Indian people, income taxes upon tribal members are not a satisfactory answer. Tribal governments are also precluded from participating in many federal assistance programs which provide significant amounts of income to local units of government.[13] In addition, tribes have uniquely high costs[14] and do not receive most state services.[15] Such state services as their members do receive, such as welfare payments, are usually heavily underwritten by the federal government.

It is axiomatic that government, however localized, cannot operate without revenue. The traditional means of obtaining governmental revenue is through taxation[16]

---

[12] See Miscellaneous Tax Bills: Hearings Before the Subcommittee on Miscellaneous Revenue Measures of the House Comm. on Ways and Means, 95th Cong., 1st Sess. 103 (1977) (Hearing on H.R. 4089 Tax Treatment of Indian Tribes and Alaskan Native Villages).

[13] American Indian Law Center, Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs (1977). Of the 598 programs studied, Indian tribal governments were found to be ineligible for 140. For another 69, the statute requires state government involvement between the tribe and the federal agency, such as a signoff by the state governor on tribal programs. Actual participation by tribes in federal assistance programs is even lower. A 1974 National Council on Indian Opportunity *Study of Federal Indian Domestic Assistance Programs* found that of the 600 programs studied (not all the same as the later study), only 78 were serving at least one tribe, and only 39 were serving more than one tribe.

[14] Barsh, *The Omen: [Confederated] Tribes* v. *Moe and the Future of Tribal Self-Government*, 5 Amer. Ind. L. Rev. 1, 46 (1977).

[15] *Id.* at 51.

[16] "No power is more basic to the ultimate purpose and function of government than is the power to tax" *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960). *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 150 (1937).

and tribes, like all governments, must have this source of funding to exist.[17] The crucial relationship between Indian self-government and the ability of the tribe to obtain tax revenues was recently recognized by this Court in a case which upheld Indian immunity to state and local taxes:

> "The suggestion is that since tribal governments are disabled under many state laws from incorporating as local units of government, *Goldberg*, *supra*, at 581, general regulatory control might relegate tribal governments to a level below that of counties and municipalities, thus essentially destroying them, particularly *if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation.*" [18]

Many tribes have turned to taxation in order to accomplish the greater self-government so long encouraged by Congress. In 1976 there were 55 tribes imposing various forms of taxes. In fiscal 1976, the last year for which the figures are available, these tribes collected more than $6,000,000 in taxes.[19] Almost one-half of this

---

[17] The Court of Appeals in *Morris* v. *Hitchcock*, 21 App. D.C. 565, 593, *aff'd* 194 U.S. 384 (1904) stated in analyzing the powers of the Chickasaw Nation, "A government of the kind necessarily has the power to maintain its existence and effectiveness through the exercise of the usual power of taxation upon all property within its limits, save as may be restricted by its organic law," quoted at 55 I.D. 47-48 (1934).

[18] *Bryan* v. *Itasca County*, 426 U.S. 373, 388 note 14 (emphasis added). *See also, Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 664 (9th Cir. 1975), where the court stated: "Moreover, tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the reservation would burden that development by increasing its cost."

[19] Figures are from Department of the Treasury, Office of Revenue Sharing, "State and Local Data Elements, Entitlement Period 9".

amount was collected in mineral severance taxes.[20] In addition to the taxes actually collected by the tribes, the tax base is a component of the revenue sharing equation by which the tribes receive additional income from the federal government.[21]

This Court has recognized that actions having adverse economic impact on tribes may be inconsistent with the Congressional goal of fostering tribal government.

> "Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government. Not only would it undermine the authority of tribal forums, see pp. 9-10, *supra*, but it would also impose serious financial burdens on already 'financially disadvantaged' tribes." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 64-65 (1978).

The effect of the Washington state tax scheme on the tribes in this case would cause just such impermissible "serious financial burdens on already 'financially disadvantaged' tribes."

III. THE SEMINOLE TRIBE OF FLORIDA

The Seminole Tribe of Florida consists of about 1400 members living in southern Florida. They live on three federal reservations, one of 480 acres in Hollywood; one

---

[20] A number of Indian tribes are in the process of adopting or have recently adopted, severance tax codes. Some of them, e.g. Jicarilla Apache and Crow, are in litigation, see note 46 below, and see *Merrion* v. *Jicarilla Tribe*, unreported (D.N. Mex. 1977), argued before 10th Cir. May 17, 1979.

[21] While the entitlement of an Indian tribe to revenue-sharing funds is based upon population, taxes collected by the tribe are considered in determining the amount allocated to the state from which tribal shares are in turn reallotted. Act of October 20, 1972, 86 Stat. 919 as amended, 31 U.S.C. §§ 1227 (b)(4); 1228 (Supp. v 1975).

of 100,000 acres south of Lake Okeechobee (called the Big Cypress Reservation); and one of 38,000 acres north of the Lake (called the Brighton Reservation). The tribe has accepted the Indian Reorganization Act of 1934 and is organized thereunder. The current tribal chairman is James Billie. There are five Indian retail tobacco outlets on the Hollywood Reservation. Until the advent two years ago of an Indian retail tobacco outlet on the Hollywood Reservation, the Seminole Tribe had little to do with non-Indians outside of its relations with federal government officials. Its annual tribal council budget was about $440,000, mostly from rentals of tribal land. Most of this went to subsidize tribal programs and pay interest on loans.

The 1980 tribal council budget, just approved, is $1,620,000, and $1,000,000 of this will come from taxes and rents generated by retail cigarette sales on the Reservation. The new budget contains many new or increased items for community improvement, such as a law and order system (including five police officers); costs, subsidies and matching funds for many community programs such as Head Start, nutrition, handicapped, food stamp, senior citizens, refuse cleanup, fire protection, construction of clinic and recreational facilities, etc.

The first Seminole retail tobacco outlet was opened in 1977 on the Hollywood Reservation. It was owned by an individual tribal member, Marcellus Osceola, who leased the land from the Tribe and paid a 4% sales tax to the Tribe. The state tax authorities quickly became interested, and after consultation with Osceola and his attorneys, and Osceola's agreement that sales would be limited to three cartons per customer,[22] the state tax authorities

[22] Florida law permits a person to enter Florida with up to three cartons of cigarettes on which the Florida taxes have not been paid. F.S.A. 210.18(4)(b). Florida law also places the primary incidence of the tax on the seller, not the buyer, although the buyer owes the tax if the seller fails to pay it. F.S.A. 210.18(4)(a).

concluded that it would not seek to collect state taxes from Osceola's cigarette sales to non-Indians.

A cigarette vending machine company then sued the state to require the tax authorities to collect state taxes on Osceola's sales to non-Indians. The state trial court ruled that the taxes were not applicable, on the ground that the incidence of the tax was on the seller (an Indian), not the buyer (in most cases a non-Indian),[23] and that the state tax could not be collected against an Indian.[24]

The vending group appealed, and the Florida intermediate appellate court affirmed in a brief opinion. After distinguishing *Moe*, the court added:

> "More on point is Confederated Tribes of Colville v. State of Washington, 446 F. Supp. 1339 (1978) [the case on review here], which, though not controlling, is persuasive authority." [25]

Since that time, four more retail outlets have been opened on the Hollywood Reservation. As mentioned above, the Seminole Tribe expects to realize over $1,000,000 in cigarette tax and rental revenues in fiscal 1980. The loss of this income would be a severe blow indeed to the ability of the Tribe to provide municipal services to the Reservation.

IV. THE COEUR D'ALENE TRIBE

The Coeur d'Alene Tribe is a federally recognized tribe consisting of about 1,000 members. The tribe and its members own some 70,000 acres of trust land on the

[23] *Vending Unlimited, Inc.* v. *State of Florida*, Second Jud. Cir. Ct. for Leon County, March 3, 1978, reprinted below, App. 21a-28a.

[24] Citing *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973); *Moe* v. *Confederated Tribes*, 425 U.S. 463 (1976).

[25] *Vending Unlimited* v. *State of Florida*, 364 So.2d 548 (Dist. Ct. App. Fla. 1978), reprinted below, App. 19a-20a.

Coeur d'Alene Reservation in northern Idaho. The tribe is organized under the Indian Reorganization Act of 1934. Its annual tribal council budget is about $350,000, of which about $60,000 comes from taxes on cigarette sales.

In 1973 the Idaho Supreme Court in the *Mahoney* case upheld the legality of cigarette sales to non-Indians free of state taxes, on the ground that for the state to collect these taxes would be an impermissible taxation of Indian commerce.[26] The court cited with approval a 1940 ruling of the Solicitor of the Interior Department to the same effect.[27]

The Idaho Supreme Court adhered to its decision even after the *Moe* decision went the other way.[28]

Obviously the loss of cigarette revenues would materially reduce the ability of this tribe to provide municipal services to the reservation.

V. THE NEVADA TRIBES

The Las Vegas Indian Colony is a group of 135 Paiute Indians located on a federal reservation of 12.5 acres within the city limits of Las Vegas, Nevada. It is recognized by the Secretary of the Interior as an Indian tribe

[26] *Mahoney* v. *State Tax Comm'n*, 96 Ida. 59, 524 P.2d 187 (1973). "Indian commerce" refers to the clause in the U.S. Constitution conferring upon Congress the power "to regulate commerce . . . with the Indian Tribes." Art. I, Sec. 8, cl. 3.

[27] 57 I.D. 129, 140-141 (1940).

[28] The initial *Mahoney* decision came down on September 5, 1973. Eight months later the District Court decision in *Moe* came down, 392 F. Supp. 1297 (D. Mont. 1974). At the request of the state of Idaho the *Mahoney* court granted rehearing, and after full briefing reaffirmed its earlier decision, 524 P.2d at 197 (1974). Later, of course, this Court affirmed the *Moe* District Court decision, 425 U.S. 463 (1976), but the state has apparently acquiesced in the *Mahoney* decision.

under federal supervision. It has accepted the Indian Reorganization Act of 1934, and is organized thereunder with a tribal council composed of seven members. The tribal chairman is Gloria Yazzie.

The Reno-Sparks Indian Colony is a group of 557 Paiute, Washoe and Shoshone Indians located on a federal reservation of 28 acres adjacent to the city of Reno, Nevada. It has accepted the Indian Reorganization Act of 1934 and is organized thereunder with a tribal council composed of seven members. Its tribal chairman is Lawrence Astor.

The Las Vegas and Reno Tribes share a common heritage of poverty, poor education and erosion of tribal culture during years of existence on tiny urban reservations. A recent BIA study,[29] for example, found that over 90% of existing housing units in the Las Vegas Colony were substandard, and conditions were so overcrowded that the existing number of units would have to be more than doubled to meet the need.[30] Yet available land is already fully covered with houses; there is no room to build more. Another 1978 BIA survey found that half of the employed members of the Reno-Sparks Colony earned under $5,000 a year.[31]

Las Vegas, Reno-Sparks, and several other Nevada tribes have enacted taxation ordinances and opened re-

[29] Bureau of Indian Affairs Annual Housing Inventory Fiscal Year, 1978.

[30] *Id.* Of 22 existing units, 21 were determined to be substandard and needing replacement. In addition, 25 new units were needed to alleviate overcrowding.

[31] Bureau of Indian Affairs Agency estimates, April 1977. Of 161 employed member of the Colony, only 81 earned over $5,000 a year.

tail tobacco outlets.[32] In such cases cigarette tax revenues typically provide virtually the only source of revenues for these tribal governments, aside from federal grants. As the state of Washington has admitted in this case,[33] double taxation of cigarette sales would eliminate these revenues.[34] The state of Nevada provides no services to the Tribe, and has no equitable claim to any revenues raised on the reservation.[35]

The Las Vegas Indian Colony expenses for the fiscal year ended June 30, 1979, were $284,450, of which $257,880 was derived from cigarette tax revenue, and $26,570 was derived from two federal government grants.[36] Thus, over 90% of all funds expended in fiscal 1979 by the Las Vegas Tribe was derived from tribal tobacco revenues. These funds were expended for basic governmental services, including tribal police, tribal patrol car and police equipment, tribal vehicles, a tractor for

[32] Other Indian reservations in Nevada where tobacco outlets have been opened are: Elko; Fallon Paiute Shoshone; Moapa; Duck Valley; Pyramid Lake Paiute; Walker River Paiute; Yerington Paiute; Battle Mountain; and Washoe.

[33] Appellants' brief at 19, 21, 29, 56.

[34] Nevada has adopted a different approach than Washington. It has enacted a statute providing that unless an Indian government imposes excise taxes on cigarette sales which are equal to or greater than the state tax, the tribe must collect the state tax in addition to the tribal tax. Nev. Rev. Stat. Ch. 370. This approach destroys the tribes' ability to set their tax at a lower level than the state's. Without this advantage, few buyers would be attracted to the tribal stores. There is nothing unique about citizens of one jurisdiction flocking to another to buy goods made cheaper by smaller taxes. See Barsh, *supra*, note 14, at 52: "Washington State's cigarette tax stamp costs 16 cents. Oregon's rate has always been lower; it is currently 9 cents. As a result, purchase of cigarettes by Washingtonians in Oregon boom[s] in border counties."

[35] For example, the State refuses to place Indians in need of mental health treatment, despite tribal court commitment orders.

[36] Pursuant to P.L. 93-638, 25 U.S.C. § 450, contract numbers H50C14201261 and H50G14208059.

demolition, land fill and improvements, land acquisition to maintain buildings and water main, to build a basketball court, make capital improvements, and to fund youth programs.

The Reno-Sparks Colony estimated revenues for calendar year 1979 are $636,000, of which $360,000, or 57%, will be derived from cigarette tax revenues.[37] The cigarette tax revenues support a tribal police program, a land purchase program, and the tribal council administration budget.

The urgent need for independent tribal revenue is shown by the following example. At Reno-Sparks, individual tribal members fell badly in arrears on their municipal sewer bills. The city notified the tribe that "unless some arrangements are made with the City to pay the delinquent fees within thirty (30) days from receipt of this letter, sewer services will be cut off to the Colony."[38] The relevant United States agencies claimed inability to help, and the Tribe and its members lacked any other sources of funds to pay the $10,686.72 due. Thanks to the new cigarette tax revenues, the Tribe assumed its members' delinquent bills and thus prevented the cutoff of sewer service to the whole Tribe.

In addition to providing emergency funds to meet basic human needs, cigarette tax revenues offer these land-short tribes their only source of funds with which to alleviate the severe pressure on the crowded reservations through purchase of adjacent land. The Las Vegas Colony has already bought 2.5 acres with funds from cigarette tax revenue and plans to make further purchases with these revenues. The Reno-Sparks Tribe also plans to make land purchases.

[37] The large bulk of the non-cigarette revenues are federal grants.

[38] Letter from Reno City Attorney to Chairman, Reno-Sparks Indian Colony, October 11, 1977.

Obviously, loss of cigarette revenues to these tribes would severely reduce their ability to provide municipal services to their reservations.

VI. THE SISSETON-WAHPETON SIOUX TRIBE

The Sisseton-Wahpeton Sioux Tribe, which has about 3,600 members, is located on the Lake Traverse Reservation in North and South Dakota.[39] The current tribal chairman is Jerry Flute.

The Sisseton-Wahpeton Tribe recently enacted a sales tax on tangible personal property sales and an excise tax on sales of tobacco products.[40] Both apply only to its political subdivisions. The taxing statutes spell out the governmental services to which the revenue may be devoted, including police and fire protection; road construction, repair and maintenance; operation of tribal court; water, sewage, and garbage disposal; education; public health; development of tribal or district enterprises; and recreation.

The Tribe already provides almost all of the services generally furnished by municipal governments, and plans to use revenue from tobacco and other sales to further expand the type and amount of services offered to its members.

The Tribe expects tax revenues to contribute a major part of the Tribe's total budget once an interstate highway now under construction opens. There will be a

[39] The Sisseton-Wahpeton Reservation was the subject of this Court's decision in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). The Lake Traverse Reservation was held by this Court to be terminated. Within the boundaries of the former reservation the Tribe owns 11,000 acres of trust land and its members own 94,000 acres of trust land.

[40] Sisseton-Wahpeton Sioux Tribal Code; Tribal Business Tangible Personal Property Sales Tax Act and Tobacco Outlets and Excise Tax Act.

cloverleaf on the reservation, and the Tribe owns land adjacent thereto. The Tribe plans a store there, which will sell cigarettes, among other things.

VII. THE CROW TRIBE

The Crow Tribe has about 4,500 members, located on a reservation in Montana of approximately 1.6 million acres. The Crow Tribe's main commercial resource is coal, which is abundant in the area. The Tribe owns large deposits underlying tribal trust land within the reservation, and also large deposits outside the reservation, reserved in federal trust when the tribe ceded surface rights to adjacent land.

The Crow unemployment rate has recently been estimated to be 48%.[41] Crow health, income, educational level and housing all fall far below the corresponding state and national averages.[42] Tribal revenues are derived from two major sources, the federal government and royalty payments for coal. Derivation of additional revenue from existing and proposed coal leases represents the Tribe's only prospect of achieving governmental and economic self-sufficiency and escaping from a history of dependence upon the federal government.

In 1975 the state of Montana enacted a severance tax on coal mined on the Reservation, in the amount of 30 percent of its value.[43] This extremely high tax has severely

[41] Bureau of Indian Affairs, U.S. Department of Interior, Estimates of Indian Population On and Adjacent to Reservations and Labor Force Status By State: April 1977, p. 8.

[42] Bureau of the Census, U.S. Dept. of Commerce, *1970 Census of Population, Detailed Characteristics, United States Summary* (1-679); *Characteristics of the Population: Montana*, pt. 28 at 28-135; *Subject Reports, American Indians* 161, 171 (1973).

[43] Mont. Rev. Codes Ann. §§ 84-1312 to -1325 (Cum. Supp. 1977) (now codified at M.C.A. §§ 15-35-101 to -110, 15-25-701 to -704).

undermined if not destroyed the Tribe's own ability to derive tax revenues from the exploitation of its coal, because in all negotiations with potential developers, the amount of royalties to be paid to the Tribe is reduced by an amount approximately equal to the amount that must be paid to the state of Montana. Furthermore, since 1975 the state has collected through taxes over three times as much money from the Tribe's coal as has the Tribe through its royalties. While Montana distributes severance tax collections to units of local government, the Crow tribal government has received none.[44]

In 1976 the Tribe enacted its own severance tax.[45] However, this tax will price Crow coal out of the marketplace unless the tribal tax preempts the state taxes.[46] Companies with whom the Tribe has been negotiating have clearly indicated that they will be economically prohibited from developing Crow coal if forced to pay both state and tribal taxes.

If this Court holds that state taxes are not preempted even when they interfere with or prevent tribal taxes, the Crow Tribe's ability to increase its tribal revenues for municipal services to its members will be severely reduced.

---

[44] See Mont. Rev. Codes Ann. §§ 84-1319 (now codified at M.C.A. § 15-35-108). This section provides how money derived from the severance tax is to be appropriated. Indian tribes are not included in the appropriations.

[45] The tax enacted dealt with taxation of coal production on the reservation proper. This tax was approved by the Secretary of the Interior on January 17, 1977. The Tribe has recently extended the tribal severance tax to embrace the Tribe's coal underlying the ceded area.

[46] The Crow Tribe brought suit to have the state tax declared preempted by the tribal tax. The District Court of Montana rejected the preemption argument and upheld the state tax. *Crow Tribe* v. *State of Montana*, —— F. Supp. —— (D. Mont. April 3, 1979).

CONCLUSION

We have reviewed federal Indian policy, and shown how important it is that tribes be able to tax commerce on their reservations. We have shown how several particular tribes would be affected if states are allowed to tax reservation commerce despite the detrimental effect on the tribes' own taxing programs. We urge the Court to affirm the District Court.

Respectfully submitted,

CHARLES A. HOBBS
1735 New York Avenue, N.W.
Washington, D.C. 20006

Counsel for Amici Curiae

Of Counsel:

STEPHEN H. WHILDEN
Hollywood, Florida

PETER J. SFERRAZZA
Reno, Nevada

BERTRAM E. HIRSCH
Belle Rose, New York

WILKINSON, CRAGUN & BARKER
GLENN P. SUGAMELI
Washington, D.C.

July 6, 1979

Appendices

APPENDIX A

THE PRESIDENT'S MESSAGE TO CONGRESS, JULY 8, 1970

116 Cong. Rec. 23258

6 Pres. Doc. 894 (1970)

To the Congress of the United States:

The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.

This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been opposed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny. Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.

But the story of the Indian in America is something more than the record of the white man's frequent aggression, broken agreements, intermittent remorse and prolonged failure. It is a record also of endurance, of survival, of adaptation and creativity in the face of overwhelming obstacles. It is a record of enormous contributions to this country—to its art and culture, to its strength and spirit, to its sense of history and its sense of purpose.

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what

the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.

Self-Determination Without Termination

The first and most basic question that must be answered with respect to Indian policy concerns the historic and legal relationship between the Federal government and Indian communities. In the past, this relationship has oscillated between two equally harsh and unacceptable extremes.

On the one hand, it has—at various times during previous Administrations—been the stated policy objective of both the Executive and Legislative branches of the Federal government eventually to terminate the trusteeship relationship between the Federal government and the Indian people. As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and s cial well-being would be repudiated; and the tribes themselves would be effectively dismantled. Tribal property would be divided among individual members who would then be assimilated into the society at large.

This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The

special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal government. The very threat that this relationship may someday be ended has created a great deal of apprehension among Indian

groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal government will disavow its responsibility and cut them adrift.

In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and resposive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving. This is the second of the two harsh approaches which have long plagued our Indian policies. Of the Department of the Interior's programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. Only 2.4 percent of HEW's Indian health programs are run by Indians. The result is a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale.

I believe that both of these policy extremes are wrong. Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume

control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy.

1. *Rejecting Termination*

Because termination is morally and legally unacceptable, because it produces bad practical results, and because the mere threat of termination tends to discourage greater self-sufficiency among Indian groups, I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress. This resolution would explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska native governments, recognizing that cultural pluralism is a source of national strength. It would assure these groups that the United States Government would continue to carry out its treaty and trusteeship obligations to them as long as the groups themselves believed that such a policy was necessary or desirable. It would guarantee that whenever Indian groups decided to assume control or responsibility for government service programs, they could do so and still receive adequate Federal financial support. In short, such a resolution would reaffirm for the Legislative branch—as I hereby affirm for the Executive branch—that the historic relationship between the Federal government and the Indian communities cannot be abridged without the consent of the Indians.

2. *The Right to Control and Operate Federal Programs*

Even as we reject the goal of forced termination, so must we reject the suffocating pattern of paternalism.

But how can we best do this? In the past, we have often assumed that because the government is obliged to provide certain services for Indians, it therefore must administer those same services. And to get rid of Federal administration, by the same token, often meant getting rid of the whole Federal program. But there is no necessary reason for this assumption. Federal support programs for non-Indian communities—hospitals and schools are two ready examples—are ordinarily administered by local authorities. There is no reason why Indian communities should be deprived of the privilege of self-determination merely because they receive monetary support from the Federal government. Nor should they lose Federal money because they reject Federal control.

For years we have talked about encouraging Indians to exercise greater self-determination, but our progress has never been commensurate with our promises. Part of the reason for this situation has been the threat of termination. But another reason is the fact that when a decision is made as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment, it should be up to the Indian tribe to determine whether it is willing and able to assume administrative responsibility for a service program which is presently administered by a Federal agency. To this end, I am proposing legislation which would empower a tribe or a group of tribes or any other Indian community to take over the control or operation of Federally-funded and administered programs in the Department of the Interior and the Department of Health, Education and Welfare whenever the tribal council or comparable community governing group voted to do so.

Under this legislation, it would not be necessary for the Federal agency administering the program to approve the transfer of responsibility. It is my hope and expectation that most such transfers of power would still take place consensually as a result of negotiations between the local community and the Federal government. But in those cases in which an impasse arises between the two parties, the final determination should rest with the Indian community.

Under the proposed legislation, Indian control of Indian programs would always be a wholly voluntary matter. It would be possible for an Indian group to select that program or that specified portion of a program that it wants to run without assuming responsibility for other components. The "right of retrocession" would also be guaranteed; this means that if the local community elected to administer a program and then later decided to give it back to the Federal government, it would always be able to do so.

Appropriate technical assistance to help local organizations successfully operate these programs would be provided by the Federal government. No tribe would risk economic disadvantage from managing its own programs; under the proposed legislation, locally-administered programs would be funded on equal terms with similar services still administered by Federal authorities. The legislation I propose would include appropriate protections against any action which endangered the rights, the health, the safety or the welfare of individuals. It would also contain accountability procedures to guard against gross negligence or mismanagement of Federal funds.

This legislation would apply only to services which go directly from the Federal government to the Indian community; those services which are channeled through State or local governments could still be turned over to Indian control by mutual consent. To run the activities for

which they have assumed control, the Indian groups could employ local people or outside experts. If they chose to hire Federal employees who had formerly administered these projects, those employees would still enjoy the privileges of Federal employee benefit programs—under special legislation which will also be submitted to the Congress.

Legislation which guarantees the right of Indians to contract for the control or operation of Federal programs would directly channel more money into Indian communities, since Indians themselves would be administering programs and drawing salaries which now often go to non-Indian administrators. The potential for Indian control is significant, for we are talking about programs which annually spend over $400 million in Federal funds. A policy which encourages Indian administration of these programs will help build greater pride and resourcefulness within the Indian community. At the same time, programs which are managed and operated by Indians are likely to be more effective in meeting Indian needs.

I speak with added confidence about these anticipated results because of the favorable experience of programs which have already been turned over to Indian control. Under the auspices of the Office of Economic Opportunity, Indian communities now run more than 60 community action agencies which are located on Federal reservations. OEO is planning to spend some $57 million in Fiscal Year 1971 through Indian-controlled grantees. For over four years, many OEO-funded programs have operated under the control of local Indian organizations and the results have been most heartening.

Two Indian tribes—the Salt River Tribe and the Zuni Tribe—have recently extended this principle of local control to virtually all of the programs which the Bureau of Indian Affairs has traditionally administered for

them. Many Federal officials, including the Agency Superintendent, have been replaced by elected tribal officers or tribal employees. The times has now come to build on these experiences and to extend local Indian control—at a rate and to the degree that the Indians themselves establish.

3. *Restoring the Sacred Lands Near Blue Lake*

* * * *

4. *Indian Education*

* * * *

5. *Economic Development Legislation*

Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as 80 percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500. As I said in September of 1968, it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructnure. To that end, I am proposing the "Indian Financing Act of 1970."

This act would do two things:

1. It would broaden the existing Revolving Loan Fund, which loans money for Indian economic development projects. I am asking that the authorization for this fund be increased from approximately $25 million to $75 million.

2. It would provide additional incentives in the form of loan guarantees, loan insurance and interest subsidies to encourage *prviate* lenders to loan more money

for Indian economic projects. An aggregate amount of $200 million would be authorized for loan guarantee and loan insurance purposes.

I also urge that legislation be enacted which would permit any tribe which chooses to do so to enter into leases of its land for up to 99 years. Indian people now own over 50 million acres of land that are held in trust by the Federal government. In order to compete in attracting investment capital for commercial, industrial and recreational development of these lands, it is essential that the tribes be able to offer long-term leases. Long-term leasing is preferable to selling such property since it enables tribes to preserve the trust ownership of their reservation homelands. But existing law limits the length of time for which many tribes can enter into such leases. Moreover, when long-term leasing is allowed, it has been granted by Congress on a case-by-case basis, a policy which again reflects a deep-rooted pattern of paternalism. The twenty reservations which have already been given authority for long-term leasing have realized important benefits from that privilege and this opportunity should now be extended to all Indian tribes.

Economic planning is another era where our efforts can be significantly improved. The comprehensive economic development plans that have been created by both the Pima-Maricopa and the Zuni Tribes provide outstanding examples of interagency cooperation in fostering Indian economic growth. The Zuni Plan, for example, extends for at least five years and involves a total of $55 million from the Departments of Interior, Housing and Urban Development, and Health, Education and Welfare and from the Office of Economic Opportunity and the Economic Development Administration. I am directing the Secretary of the Interior to play an active role in coordinating additional projects of this kind.

6. *More Money for Indian Health*

* * * *

7. *Helping Urban Indians*

* * * *

8. *Indian Trust Counsel Authority*

* * * *

9. *Assistant Secretary for Indian and Territorial Affairs*

* * * *

Continuing Programs

* * * *

The recommendations of this Administration represent an historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems. In place of a long series of piecemeal reforms, we suggest a new and coherent strategy. In place of policies which simply call for more spending, we suggest policies which call for wiser spending. In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.

But most importantly, we have turned from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be fulfilled. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

The Indians of America need Federal assistance—this much has long been clear. What has not always been

clear, however, is that the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems. And that is why we now approach these problems with new confidence that they will successfully be overcome.

RICHARD NIXON

The White House
July 8, 1970

APPENDIX B

FOR IMMEDIATE RELEASE JULY 16, 1976

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

REMARKS OF THE PRESIDENT
[Gerald Ford]

TO THE
AMERICAN INDIAN LEADERS

THE EAST ROOM

3:15 P.M. EDT

Let me welcome each and every one of you to the White House this afternoon. I am extremely happy to have the opportunity to meet with you individually as well as collectively and I am very proud to have the distinguished leaders and the elected representatives of America's Indian tribes here in the East Room of the White House.

I looked over your schedule and I hope from the distinguished speakers that spoke with you that you have had an informative briefing session, not only with Secretary Kleppe, but the others—those who were responsible for some of the Government Indian programs. I think it is vitally important that you tell us what your problems are, what your needs are and then we can be fully informed as to the right policies and the right programs.

Let me take just a few minutes to talk with you on a personal basis, to let you know of my personal concern and for the needs of Indians and native Americans. The Federal Government has a very unique relationship with you and your people. It is a relationship of a legal

trust and a high moral responsibility. That relationship is rooted deep in history, but it is fed today by our concern that the Indian people should enjoy the same opportunities as other Americans, while maintaining the culture and the traditions that you rightly prize as your heritage.

That heritage is an important part of the American culture that we are celebrating in this great country in our Bicentennial year. Your contribution has been both material and spiritual. Your ancestors introduced settlers not only to new foods and new plants, but to Indian ways of life and Indian values which they absorbed.

This is a year for all of us to realize what a great debt we individually and collectively owe to the American Indians. Today, you are concerned about such serious problems as poverty, unemployment, crime, poor health and unsuitable housing on Indian reservations. I share your concern. I am hopeful about the future and about what we can achieve by continuing to work together.

The 1970s have brought a new era in Indian affairs. In the last century, Federal policy has vacillated between paternalism and the threat of terminating Federal responsibility. I am opposed to both extremes. I believe in maintaining a stable policy so that Indians and Indian leaders can plan and work confidently for the future.

We can build on that foundation to improve the opportunities available to American Indians, and at the same time, make it possible for you to live as you choose within your tribal structure and in brotherhood with your fellow citizens.

We have already begun to build. My Administration is supporting the concept of allowing Indian tribes to determine whether they and their members, in addition to

being under tribal jurisdiction, should be under State or Federal civil and criminal jurisdiction.

I have directed the Departments of Justice and Interior to draft legislation which would accomplish this goal efficiently, effectively and within adequate guidelines. They have solicited the views of the Indian community in preparing their recommendations which I will soon send to the Congress.

I am committed to furthering the self-determination of Indian communities but without terminating the special relationship between the Federal Government and the Indian people. I am strongly opposed to termination. Self-determination means that you can decide the nature of your tribe's relationship with the Federal Government within the framework of the Self-Determination Act, which I signed in January of 1975.

Indian tribes, if they desire, now have the opportunity to administer Federal programs for themselves. We can then work together as partners.

On your part, this requires initiative and responsibility as you define your tribal goals and determine how you want to use the Federal resources. On the Federal Government's part, self-determination for Indian tribes requires that Federal programs must be flexible enough to deal with the different needs and desires of individual tribes.

In the past, our flexibility has been limited by the lack of effective coordination among departments and agencies offering a wide variety of programs and services to the Indian people. Programs serving both reservation and non-reservation Indians are spread across half a dozen different Cabinet Departments involving agencies ranging from the Economic Development Administration to the Federal Aviation Administration.

As many of you know, this is Ted Marrs' last day on the White House staff. Ted's service as White House Liaison for Indian Affairs has been invaluable to me as President and to the Cabinet officers and, I am confident, to the Indian community.

With his departure, I will announce shortly the name of a person who will assume Ted Marrs' duties in the Office of Public Liaison in the area of Indian Affairs. This appointee will be an individual with responsibility to work with the Cabinet officers, with the Office of Management and Budget, with the Domestic Council and with my Legal Office to encourage the improved coordination of the various Federal agencies and programs that currently serve the Indian population.

As an additional step in this direction, I am also sending a memorandum to the heads of all Cabinet departments with Indian responsibilities, directing them to give priority attention to the coordination of Indian programs. These two actions will help to insure that one and one half billion dollars spent annually on Indian programs and services will be spent efficiently, with cooperation and without duplication.

An important task we can help you with is the challenge of economic development of your lands. I congratulate you on the initiative that you have shown. I pledge encouragement. I pledge help in your efforts to create long-term economic development.

Many Indian reservations contain valuable natural resources. There must be the proper treatment of these resources with respect for nature, which is a traditional Indian value. My Attorney General has established an Indian resources section whose sole responsibility is litigation on behalf of Indian tribes to protect your natural resources and your jurisdictional rights.

Indian leaders and the Indian people have gained an increasing skill in managing these resources so they benefit your tribes and our nation as a whole. I wholeheartedly and uuequivocally pledge our cooperation in working with you to improve the quality of Indian life by providing soundly managed programs and a stable policy.

We can make the rest of the 1970s decisive years in the lives of the Indian people. Together we can write a new chapter in the history of this land that we all serve and this land that we all share.

I thank you very much.

APPENDIX C

THE WHITE HOUSE

WASHINGTON

August 30, 1978

I extend best wishes to the delegates at the Thirty-Fifth Congressional Session of the National Congress of American Indians, and I hope your conference will be a productive and rewarding one.

I realize this is an unusual and perplexing time for Indian leaders. At both the state and Federal levels there is a deep concern about events that might change the status of American Indians. There is also concern about the environmental and energy shifts that have changed the lives of all our citizens.

I consider it my solemn duty and obligation as President to see that we fulfill our trusteeship responsibilities within the framework of self-determination for American Indians. In particular, I would like to reaffirm my resolve to honor this country's legal and moral responsibilities to American Indians in protecting their land, water and natural resources. And I am fully committed to the task of protecting the human and civil rights of all native Americans.

On behalf of my Administration, I congratulate the officers and delegates at this Congress for their hard work and sustained accomplishment. The Federal Government has a special relationship with Indian tribes, and I look forward to our close cooperaation in the coming years.

/s/ Jimmy Carter

APPENDIX D

VENDING UNLIMITED CASE—APPELLATE OPINION, 364 So.2d 548

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JULY TERM, A.D., 1978

Case No. JJ-406

VENDING UNLIMITED, INC., d/b/a/ ACE SAXON, a Florida corporation, and EDWARD J. STACK,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, and CHARLES A. NUZUM, Director,
Appellees.

Opinion filed November 22, 1978.

An appeal from the Circuit Court for Leon County. Charles E. Miner, Jr., Judge.

David T. Price of Price & Byrne for appellant.

Dennis E. LaRosa; Jack M. Skelding, Jr. of Madigan, Parker, Gatlin, Swedmark & Skelding; Sherryll Martens Dunaj; A. J. Ryan; Lawrence A. Aschenbrenner for appellee.

PER CURIAM.

This case involves Indians, Indian reservations and taxes. Appellant Stack, though a public official, sought in

his individual capacity as a citizen and taxpayer to require imposition of taxes on certain transactions involving the sale of cigarettes to and by Osceola, whose place of business is located on an Indian reservation within the boundaries of the State of Florida. Appellees took the unusual position, though with admirable candor, that the sales were not taxable by the taxing authorities of the State of Florida. Appellant, having been unsuccessful in his endeavor to require imposition of the tax, sought review here, relying primarily on Moe v. The Confederated Salish and Kootenai Tribes, 96 S.Ct. 148 (1976). We find that case to be distinguishable for the reason that, inter alia, the statute there involved is materially different from the relevant Florida statutes as written and construed. More on point is Confederated Tribes of Colville v. State of Washington, 446 F.Supp. 1339 (1978), which, though not controlling, is persuasive authority.

AFFIRMED.

BOYER, Acting Chief Judge, MILLS and BOOTH, JJ., Concur.

APPENDIX E

VENDING UNLIMITED CASE—TRIAL COURT OPINION

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

ORDER

Case No. 77-1933

VENDING UNLIMITED, INC., d/b/a/ ACE SAXON, a Florida corporation, and EDWARD J. STACK,
Plaintiffs/Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, and CHARLES A. NUZUM, Director,
Defendants/Respondents.

This action is an original proceeding in mandamus brought by two Florida taxpayers seeking an order directing the State of Florida, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco (State), to collect cigarette taxes from a Seminole Indian-owned Smoke Shop located in Broward County, Florida.

The Court finds that it has jurisdiction over the subject matter, and parties pursuant to Article V, Section 5, *Florida Constitution.* The executive branch of government is not immune from the coercive powers of the Circuit Courts which may direct the exercise of a non-discretionary function. The Petitioners (Vending Unlimited), submit that the collection of the cigarette tax imposed under Chapter 210, Florida Statutes, and to be

collected by the State is a mandatory function which is devoid of discretionary character.

It is appropriate, therefore, to explore that function and determine whether Chapter 210, Florida Statutes mandates the collection of the cigarette tax from the Smoke Shop under the facts of this case. The Smoke Shop has intervened in these proceedings and defends the State's petition.

FINDINGS OF FACT

The following is a recitation of the relevant facts stipulated to and submitted by the parties.

Intervenor, Marcellus Osceola, d/b/a/ Osceola's Trading Post (Smoke Shop), is an enrolled member of the Seminole Indian Tribe, and owner of a cigarette business located on the Hollywood Seminole Indian Reservation in Broward County. The principal item for sale is cigarettes shipped directly from Alabama to the Smoke Shop via common carrier. The cigarettes are currently being sold to the general public and no cigarette tax is collected by the Smoke Shop nor remitted to the State.

The Smoke Shop is located on U. S. Highway 441 (State Road 7), several blocks south of Sterling Road. Motorists obtain access to the shop by turning off of Highway 441 and proceeding to two drive-in windows located on two sides of a mobile home type building. Sales at the Smoke Shop are estimated at 115,000 cartons per month and when translated into tax dollars at a rate of $2.10 per carton, the total exceeds $2.8 million per year. Since August 15, 1977 the Smoke Shop's laid-in cost of cigarettes is equal to the sum of the wholesale price of cartons shipped from Alabama, the cost of transportation, handling and selling, plus a four percent (4%) tax per carton imposed by the Seminole Tribe, pursuant to its Ordinance No. C-1-7-78. This cost represents a considerable advantage over other cigarette

retailers who must include the $2.10 per carton tax which is paid by a qualified Florida distributor.

CONCLUSIONS OF LAW

The issue is narrowly drawn from the opinion expressed in *Moe* v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976). The Supreme Court held that *Section 84-5606(1), Montana Revenue Code Annotated*, imposed a cigarette tax upon the ultimate consumer of cigarettes and that it was precollected by the retailer seller (Indian Smoke Shop) for convenience only. Under the facts of *Moe*, the Smoke Shop was ordered to collect the tax from the consumer/purchaser as it was the consumer and not the Indian, that benefited from the non-collection. The Court implied that the collection of the tax also not frustrate tribal government.

Indian law notwithstanding, the present case turns upon the interpretation of Chapter 210, Florida Statutes, and whether under the facts before the Court it is, as the State contends, an excise or privilege tax on the Florida wholesaler, or as Vending Unlimited insists, constitutes a tax upon the ultimate consumer which may be collected and remitted by the Smoke Shop.

The sale of cigarettes in Florida is based upon a three-tiered system of distribution. The manufacturer, as the top of the pyramid, sells cigarettes through its representatives (*Section 210.01(16), Florida Statutes*), to "distributing agents" (*Section 210.01(14) Florida Statutes*), and "wholesale dealers" (*Section 210.01(6), Florida Statutes*). The manufacturer's representative is similar to a "drummer" who takes orders and oversees deliveries but does not ship or store the commodity. The wholesaler (agent or dealer) is required by statute (*Section 210.15(1)(a), Florida Statutes*), to "affix or cause to be affixed" tax indicia representing the payment of the

tax to the State on every package of cigarettes it receives. (*Section 210.06(1), Florida Statutes*).

The agent or dealer is then required to sell its cigarettes to a retail dealer for resale purposes only.

210.01 Definitions.:

(7) "Retail dealer" means any person other than a wholesale dealer engaged in the business of selling cigarettes.

210.15 Permits.:

(1) (h) . . . Cigarettes may be purchased for retail purposes only from a person holding a wholesale dealer permit . . .

The distribution system separates the functions and activities of the wholesale and retail dealer. The retailer is not required to obtain a permit from the Division of Alcoholic Beverages & Tobacco, but is required to obtain a general retail sales permit from the Department of Revenue (*Section 210.15(1)(h), Florida Statutes*). The retailer does not collect or remit any cigarette taxes under the chapter. The retailer is not even permitted to possess untaxed cigarettes.

Section 210.06 Affixation of stamps; presumption:

(3) Whenever any cigarettes are found in the place of business of any such retail dealer . . . *without stamps affixed*, the presumption shall be that such cigarettes are kept in violation of the provision of law. (Emphasis supplied)

The assurance that the tax will be collected is based upon the regulatory scheme that places the burden of remitting the tax upon the wholesale dealer or agent.

Consistent with this concept is the following proscription directed toward the Division of Beverage:

Section 210.15 Permits.:

(2) The Division may not sell stamps or approve the use of meter machines to evidence the payment of taxes on cigarettes except to qualified wholesale dealers.

Vending Unlimited has not urged that the State sell stamps or approve the use of meter machines on cigarettes sold by the Smoke Shop, but such requirement is implicit. The proof of the collection of the tax is evidenced by the indicia appearing on each package. For the State to collect the tax it must be permitted to sell the indicia to the Smoke Shop. No party has suggested that the Shop is anything other than a retail outlet for cigarettes. *Section 210.04(9), Florida Statutes* states:

> *Agent* . . . shall purchase stamps and affix such stamps in the manner prescribed . . . in which case any *dealer* subsequently receiving such stamped packages of cigarettes will not be required to purchase and affix stamps on such packages of cigarettes. (Emphasis supplied)

This section is indication that the taxing incidence is focused at the dealer/agent level.

The tax itself is levied by *Section 2102, Florida Statutes (1977)*:

(1) An excise or privilege tax . . . is imposed upon the sale . . . possession . . . distribution and use of cigarettes in this state . . . (Emphasis supplied)

The original act was passed as *Chapter 21946, Section 2, Laws of Florida (1943)*. The first legislative expression emphasized that the tax placed upon cigarettes is an excise or privilege tax. The necessity for these terms is to distinguish the tax from a property or direct tax. In *City of Deland* v. *Florida Public Service Company, 161 So. 735, 738 (Fla. 1935)*, the Supreme Court said:

An indirect tax is a tax upon some right or privilege or corporate franchise, and is most often called an excise tax or occupational tax.

Chapter 21946, Section 2, began with the phrase:

. . . (E)very person . . . shall pay to the State of Florida *license* or excise taxes herein imposed . . . (Emphasis supplied)

The word "license" was later changed to "excise" in order to avoid the proscription against raising revenue in the guise of a license fee. Excise taxes have been construed to be the same as occupational taxes. See *Hi-Octane Terminal Company* v. *Panama City, 164 So. 2d 39, 40, 41 (Fla. 1st DCA 1964).*

The question is, therefore, upon which level of the distribution of cigarettes is the privilege tax levied? *Section 210.04(8), Florida Statutes,* reads in pertinent part as follows:

(8) Except as hereinafter provided, all agents (dealers) shall be liable for the collection and payment of the tax imposed by this chapter, and shall pay the tax to the division by purchasing . . . (tax indicia) . . . under such regulations as it shall prescribe . . .

The thrust of the cigarette law, reading the entire chapter as a whole, is to impose an excise tax on the wholesale level for the privilege of dealing in cigarettes. See *Sections 210.09(1)* and *210.13, Florida Statutes.*

Vending Unlimited has suggested that *Section 210.02 (6), Florida Statutes,* provides a basis for concluding that the tax is upon the ultimate consumer or purchaser. Even if the "privilege" tax is levied upon the consumer, which the Court believes it is not, *Section 210.02(6), Florida Statutes,* does not provide the answer the Petitioners seek.

This tax shall be paid by the dealer . . . upon the first sale or transaction within the state, *whether or not* such sale or transfer be to the *ultimate purchaser or consumer* . . . The seller or dealer shall be responsible for the collection of the tax and the payment of the same to the Division. *Whenever cigarettes are shipped from outside the state to anyone other than a distributing agent or wholesale dealer, the person receiving the cigarettes shall be responsible for the tax on said cigarettes and the payment of the same to the Division.* (Emphasis supplied) *Section 210.02(6)*

The tax must be remitted to the State upon the first sale or transaction. Under the other provisions of the chapter that first sale is the purchase by the wholesaler from the manufacturer's representative or out-of-state wholesaler. The reference to "seller" in the section quoted can only refer to a wholesaler. "Seller" is not defined elsewhere in the chapter and must be construed in pari materia with the intent of the section. Because a retailer may not possess non-taxed cigarettes, and the State may not sell tax indicia to a retailer, the word "seller" must refer to either a wholesale dealer or agent. This interpretation seems consistent with distribution system focused at the wholesale level.

Having found the tax to be an excise tax upon the privilege of dealing in cigarettes at the wholesale level it is unnecessary to consider whether the tax is a burden on tribal self-government. The relevant Indian law presented to the Court suggests that the State may not directly tax an Indian business on reservation land except where permitted to do so by treaty or congressional action. See *Bryan* v. *Itasca County, 426 U.S. 373 (1976); McClanahan* v. *State Tax Commission of Arizona, 411 U.S. 164 (1973); Mescalero Apache Tribe* v. *Jones, 411 U.S. 145 (1973); Moe* v. *Salish and Kootenai Tribes, supra.*

The State has offered the alternative construction of Chapter 210, that if the tax incidence is not upon the wholesaler, then it falls directly upon the Smoke Shop. Based upon the preceding discussion, the Court rejects that theory.

The Legislature simply has not contemplated the factual situation presented in this case. There is certainly a means to collect the tax in question by amending the act in line with the *Moe* decision. But the Court is unable to find the present ability of the State to obtain the tax from the Smoke Shop under the current law. It is therefore

ORDERED and ADJUDGED that the Petition for Writ of Mandamus is hereby denied.

DONE at Tallahassee, Florida, this 3rd day of March, 1978.

/s/ Charles E. Miner, Jr.
CHARLES E. MINER, JR.
Circuit Judge